Again, the retention money concerned herein is declared by clause 30(4)(a) as being money held by the garnishee on trust for the judgment debtor. The implication would be inevitable that the retention money would belong beneficially to the judgment-debtor. In fact, in *Rayack Construction Ltd.* v. *Lampeter Meat Co. Ltd.*[3], a clause identical to clause 30(4)(a) herein came up for the court's interpretation in connection with a declaration being sought by a contractor from the court as regards his employer that the employer was obliged to pay the retention sum into a separate bank account to hold the same in trust for the contractor and consequential injunctions, Vinelott J. allowed the declaration there. The object would appear to ensure that any potential judgment creditor of the employer would not execute in error his judgment on such retention sum.

One cannot lose sight of the fact also that the retention sum was deducted for value of work already and actually done and materials already and actually supplied as certified by the architect to be due.

In my judgment, the retention sum in this case is an existing debt and in fact an existing indebted sum that involves the payment, notionally and irresistibly pursuant to an interim certificate issued by the architect, by the garnishee to the judgment-debtor and the latter's payment in turn back to the garnishee for retention for purposes already stated, with the garnishee holding the money as trustee for the judgment debtor. A debt in respect of such money began to exist in the circumstances and still does exist, and to contend otherwise would be to defy common sense and logic.

I have no doubt that for damages and loss to be quantified by a court or an arbitrator later for alleged breach of contract on the part of the judgment debtor, the garnishee could have the right to dip into such retention money for satisfaction, but this would depend on one crucial point. If the contract was terminated only after the order to the garnishee to show cause was served on the garnishee, such notice of termination would not affect the right of the judgment creditor who should therefore have priority over the garnishee. Here, the order to the garnishee to show cause was served before the notice of termination of the contract was issued. Please see the judgment of the English Court of Appeal in *Grant Plant Hire* v. *Trickey (Beaconsfield Urban District Council, Garnishee).*[4]

Although clause 30(4)(b) and (c) provide for even two certificates of the architect to be issued before the retention sum would be refunded to the judgment-debtor, such retention sum could still be attached before the issue of such certificates, for they provide for deferred payment only, mentioned by me earlier, as security for making good any defective work, in no way impairing the nature of the retention sum as an existing debt with deferred payment.

For comparison purpose, an interim certificate for payment of value of work done would create a debt but a certificate of practical completion under clause 30(4)(a) or a certificate of completion of making good defects would not create an existing debt but merely indicates the time of refund of the retention sum.

In the light of what has been stated above, the three contentions of the garnishee will therefore fall to the ground.

I would therefore dismiss the appeal with costs and confirm the garnishee order absolute made by the learned Registrar.

Appeal dismissed.

Solicitors: *Thevin Chandran Siva Wong & Jamal; Ariff & Co.*

CHIN CHEN FUI v. MAJLIS PERBANDARAN SANDAKAN

[O.C.J. (Abu Mansor J.) December 1, 1987]

[Sandakan – Civil Suit No. S. 164 of 1985]

Local Government – Appointment of Deputy President of the Sandakan Municipal Council – Appointment approved by Minister – Salary paid out of Council's funds – Who was the employer – Whether contract of employment frustrated – Summary judgment sought – Local Government Ordinance 1961, ss. 53 & 63.

The plaintiff in this case was a qualified architect. The present dispute related to his appointment as Timbalan Presiden (1) of the Majlis Perbandaran Sandakan.

On January 17, 1985 the then Chief Minister of Sabah asked the plaintiff to submit his proposal of the terms and conditions for appointment as Timbalan Presiden (1) of the Majlis Perbandaran Sandakan for a period of two years. The plaintiff duly submitted his proposal which was agreed to by the Chief Minister. The Minister of Town and Country Development also approved the plaintiff's appointment. The defendant duly put the plaintiff to work, as required by the state government, to study and review the local authority's administration and financial management.

By a letter dated April 26, 1985 from the Permanent Secretary to the Ministry of Town and Country Development to the President of the Majlis Perbandaran Sandakan, the state government withdrew the plaintiff's appointment to study and review the administration and financial management of the Sandakan Council with immediate effect. Following from this, on May 6, 1985, the President of the Municipal Council Sandakan wrote to the plaintiff enclosing a copy of the Ministry's letter dated April 26, 1985. Then by a letter dated May 6, 1985, the Permanent Secretary to the Ministry of Local Government and Housing wrote to the President of the Majlis Perbandaran Sandakan, directing him to terminate the plaintiff's appointment as Timbalan Presiden (1). The plaintiff was dismissed and given one month's salary in lieu of prior notice.

The main issues in this case were: (a) in whose employment the plaintiff was; (b) whether the contract of employment was frustrated by the letter of withdrawal of the Permanent Secretary.

Held: (1) the court was of the view that the plaintiff was in the employment of the defendants, and not that of the state government. The appointment of the plaintiff by the Minister was only a mode of making the appointment, but once appointed, he was the employee of the Sandakan Municipal Council since he was paid out of the Council's funds;

(2) the Minister's withdrawal of the plaintiff's work in doing the review did not destroy the contract of employment. The withdrawal was only a step towards his dismissal and did not strike at the root of the contract he entered into with the defendants;

(3) when the plaintiff's appointment was terminated, the defendant did not have regard to the contract existing between them and the plaintiff. They have therefore committed a clear breach of the contract.

Case referred to:

(1) *Ramli bin Zakaria & Ors.* v. *Government of Malaysia* [1982] 2 M.L.J. 257.

CIVIL SUIT.

Vallentine Willie for the plaintiff.
Raymond Tan for the defendants.

Cur. Adv. Vult.

Abu Mansor J.: By his summons in chambers under Order 14 Rules of the High Court 1980 dated January 17, 1986, the plaintiff applied for final judgment against the defendants for an amount claimed in the statement of claim. The application is supported by the affidavit of the plaintiff. After hearing arguments, I reserved judgment to a date to be fixed.

The facts of this case are as set out in the supporting affidavit of the plaintiff. The plaintiff is a qualified architect. Upon his return from studies, he was appointed to various posts in Sabah. Prior to the appointment as Timbalan Presiden (1) of the Majlis Perbandaran Sandakan, which is the subject of the present dispute, he was President of the Labuan Municipal Council.

It is not disputed that on January 17, 1985, the then Chief Minister of Sabah, Datuk Harris Mohd. Salleh, asked the plaintiff to submit his proposal of the terms and conditions for appointment as Timbalan Presiden (1) of the Majlis Perbandaran Sandakan for a period of two years (CCF. 5). He did so and on January 17, 1985, the said Chief Minister agreed to the terms by minuting "Dipersetujui – sila uruskan". It is also not disputed that the letter CCF.5 contained all the terms and conditions of the plaintiff's appointment from his salary to all the other benefits.

Thereafter followed the various correspondence from the Chief Minister's office to the Minister of Town and Country Development and what is also not disputed is the letter dated February 1, 1985 (CCF. 7) from the said Ministry to the President of the Majlis Perbandaran Sandakan whereby the Minister approved the creation of the post of Timbalan Presiden (1) in the said Majlis Perbandaran. By this token, the Minister also approved the plaintiff's appointment on contract for two years with all the terms as in CCF.5, with effect from January 22, 1985 (CCF. 7). The plaintiff's appointment was endorsed by the President of the Majlis Perbandaran on February 15, 1985 by the usual minute to take "tindakan". The plaintiff had also to resign his substantive post in the civil service in order to take his appointment in Sandakan and the defendant duly put the plaintiff to work, as required by the state government, to study and review the local authority's administration and financial management. He was properly remunerated according to the terms and conditions agreed to.

It is further not disputed that by a letter dated April 26, 1985 from the Permanent Secretary to the Ministry of Town and Country Development to the President of the Majlis Perbandaran Sandakan (CCF. L5), the state government withdrew the plaintiff's appointment to study and review the administration and financial management of the Sandakan Council with immediate effect. Following from this, on May 6, 1985, the President of the Municipal Council Sandakan wrote to the plaintiff enclosing a copy of the Ministry's letter of withdrawal dated April 26, 1985. Then by a letter dated May 6, 1985, the Permanent Secre-

tary to the Ministry of Local Government and Housing wrote to the President of the Majlis Perbandaran Sandakan, directing him to terminate the plaintiff's appointment as Timbalan Presiden (1) of the Majlis Perbandaran Sandakan without prior notice and he be given one month's pay in lieu thereof. Upon the plaintiff's dismissal, a sum of M$8,562.06 was paid into his account representing one month's pay in lieu. He was asked to vacate his quarters. He sustained loss of benefits he enjoyed as a result of the termination of his appointment. His total claim is as stated in his statement of claim. He tried to mitigate his damage by applying for alternative posts but without success.

Turning to the arguments in open court, Mr. Willie, for the plaintiff, repeated all the facts above which the defendants did not dispute. Plaintiff's counsel went on to say that from the facts as given, there was clearly a contract of employment of the plaintiff by the defendants on terms with all those benefits attached to such employment commencing on January 22, 1985 and on May 6, 1985, there was dismissal of the plaintiff.

Mr. Raymond Tan for the defendants argued that the defence case was that the plaintiff was not employed by the defendants but by the state government of Sabah. He went on to argue that the defendant is a creation of statute from which it obtains its powers. Before there can be appointment of the plaintiff, the appointment must be approved by the Ministry of Local Government and Housing and in fact in the present case, approval was indeed obtained (CCF. 7) for the plaintiff's appointment as Timbalan Presiden (1). The defendants submitted that there was withdrawal of the plaintiff's appointment by the Minister of Local Government and Housing, and the contract was frustrated. In order that the matter may be properly argued, on their application, the defendants were allowed to amend their defence to include the defence of frustration. It is not disputed that in paragraph 3 of the Sandakan Municipal Council's President's affidavit affirmed on February 18, 1986, he deposed that the Minister of Local Government and Housing, *vide* his letter of May 6, 1985, withdrew the plaintiff's appointment and as such he could no longer serve. The defendants contended, disputed by the plaintiff, that the withdrawal of the plaintiff's appointment amounted to frustration of the contract. Such being the case, the defendants say they are not liable for the determination of the service of the plaintiff. I will deal with the question of in whose employment the plaintiff was during the relevant period we are considering. After having heard the parties, I am of the firm view that the plaintiff was in the employment of the defendants and not that of the state government.

The Sandakan Municipal Council was set up by the Sandakan Municipal Council Instrument ("the Instrument") under the hand of the Yang di-Pertua Negeri in 1983 by virtue of the Local Government Ordinance 1961. Under clause 8 of the said Instrument, the Vice-President shall be appointed by the Minister for such period, being longer than one year, as he may determine and such persons shall be members of the State Public Service. It would appear that under section 53 of the Local Government Ordinance 1961, the Sandakan Council has its own funds in which revenues are put in and expended. Under section 63 of the said Ordinance, the Council is obliged to pass, not less than three months before the expiry of each financial year, detailed estimates of the revenue and expenditure for the next financial year. From the above, it would be safe to assume that the Sandakan Municipal Council is a financially autonomous authority and it would be also safe to assume that the plaintiff's salary was paid from the Council's fund. From the above, I also find that the appointment of the plaintiff by the Minister is only a mode of making the appointment but once appointed, it is clear that since he is paid out of the Council's fund, he is the employee of the Sandakan Municipal Council. In a similar way, when the Public Service Commission makes the appointment to the government service, the employee in no way becomes the employee of the Public Service Commission.

I will now deal with the defendants' defence of frustration. When the state government minister concerned withdrew the appointment of the plaintiff to do the review of the Sandakan Municipal Council's administrative and financial management, could it be interpreted that the contract of employment of the plaintiff with the defendants had been frustrated? The defendants said it did so whereas the plaintiff said it did not. In *Ramli bin Zakaria & Ors.* v. *Government of Malaysia*[1], the Federal Court held:

> "(1) where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration;"

To my mind, whether the withdrawal of the work of review by the Minister amounted to frustration of the contract would certainly depend on the view one takes of the effect of the Minister's direction on the subsisting contract of employment between the plaintiff and the defendants. I take the view that the Minister's withdrawal of the plaintiff's work in doing the review did not destroy the contract of employment. The withdrawal was only a step towards his dismissal and did not strike at the root of the contract he entered into with the defendants. He could easily be put to do other duties and the contract can still be performed. If he was to be dismissed, I am of the view that the prime mover for his dismissal would still be his employer, the defendants, since section 29(3) of the Interpretation and General Clauses Enactment (Sabah) says:

"29(3) Where any state law confers upon any authority a power to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as including a power to dismiss or suspend any person appointed and to appoint another person temporarily in the place of any person so suspended or in place of any sick or absent holder of such office or place:

Provided that where the power of such authority to make such appointment is only exercisable upon the recommendation, or subject to the approval or consent, of some other authority, the powers conferred by this subsection shall, unless the contrary intention appears, only be exercisable upon such recommendation or subject to such approval or consent."

The defendant, with the concurrence of the Minister, could decide that his services be terminated but before that is done, the defendants would certainly have to contend with and have regard to the existing contract of employment with the plaintiff. Should the defendants fail to do so, then he must pay the penalty. I am of the view that since the defendants did not have regard to the contract existing between them and the plaintiff, they have therefore committed a clear breach of the contract.

In giving this judgment, I am not unmindful of the submission made before me by learned counsel for the defendants when he submitted that they have managed to raise issues of law as regards the issue of frustration of the contract. Having considered this matter, I am of the view that the contract between the defendants and plaintiff has not been affected by frustration for reasons given. To my mind, this is a clear matter of a breach by the defendants in terminating the plaintiff's subsisting contract for which there is no available defence and I, therefore, order judgment for plaintiff against the defendants in amount in the statement of claim with interest and costs.

Order accordingly.

Solicitors: *Skinner Lind Robertson Willie Wong Chin & Co.; Chin Lau Wong & Foo Co.*

CIK ANIZA YAACOB & 763 ORS. v. MOSTEK MALAYSIA SDN. BHD. & 2 ORS.

[O.C.J. (Mohamed Dzaiddin J.) January 26, July 20, September 30, October 19 & November 16, 1987]

[Penang – Originating Motion No. 32-54-86]

Administrative Law – Decision of Industrial Court – Quashing of – Order of certiorari – Application for – Merits of application – Industrial Relations Act 1967, s. 33(A) – R.H.C. 1980, O. 2 r. 1, O. 53 rr. 1 & 2.

The applicants in this case applied to the Industrial Court to refer certain points of law to the High Court for its decision. The application was dismissed by the Industrial Court.

The applicants therefore sought an order of certiorari to quash the decision of the court.

In determining the main issue, two preliminary issues were raised. The third respondent contended, firstly, that the application for certiorari was not properly made as it did not comply with Order 53 rule 2 of the Rules of the High Court. Secondly, it was argued that the present application was actually for a mandamus.

Held, dismissing the application: (1) in this case, leave to apply for an order of certiorari was already granted on an originating motion but the applicants used the same originating motion to apply for a substantive order. This is only an error in form and there was no injustice done to the respondents or that they were in any way prejudiced by such procedural error committed by the applicants. This error was merely an irregularity which was curable under Order 2 rule 1(1);

(2) it was not necessary for the applicants to make the application for an order of certiorari and also for an order of mandamus simultaneously;

(3) in handing down its award, the Industrial Court did consider the correct law and applied its mind to the proper question for the purpose of making the award. It had properly followed the correct principles and applied the four conditions under section 33A(1) of the Industrial Relations Act 1967 and came to its conclusion that the points of law raised were not of sufficient doubt to merit any reference to the High Court. The President of the court had considered the issues thoroughly and correctly. On the fundamental